KANNAN & ANOR. v. MENTERI BURUH DAN TENAGA RAKYAT & ORS.

[O.C.J. (Syed Othman J.) November 10, 1973]
[Kuantan — Originating Motion No. 9 of 1972]

Industrial Law — Order by Minister confirming dismissal — Whether order can be challenged on application for certiorari — Whether decision reached according to law — Industrial Relations Act, 1967, s. 16A.

Administrative Law — Decision of Minister final and conclusive — Whether can be quashed by certiorari.

The applicants had been dismissed by their employers. Subsequently an inquiry was held by the Minister of Labour under section 16A of the Industrial Relations Act, 1967, and the Minister decided to confirm the dismissal. The applicants applied for an order of *certiorari* to quash the decision of the Minister on the ground that the Minister had acted in error of law and exceeded his jurisdiction in refusing to interfere with the decision of the employers, as there was insufficient evidence to support or justify the dismissal.

Held: (1) the decision of the Minister can be questioned if it can be shown that it was reached as a result of no proper inquiry or of failure to comply with the prescribed procedure for an enquiry or if it can be shown that the decision was a nullity for lack of jurisdiction or for failure to comply with the law;

(2) in this case no ground for *certiorari* had been shown and therefore the application must be dismissed.

Cases referred to:-

(1) *Catt* v. *Wood* [1910] A.C. 404.
(2) *Smith* v. *East Elloe Rural District Council* [1956] A.C. 736.
(3) *Mohamed Ashraff & Anor.* v. *Commissioner of Federal Capital, Kuala Lumpur* [1972] 2 M.L.J. 69.
(4) *Anisminic Ltd.* v. *Foreign Compensation Commissioner & Anor.* [1969] 2 A.C. 147.
(5) *Bradlaugh's Case* (1878) 3 Q.B.D. 509.
(6) *Andrew & Ors.* v. *Mitchell* [1905] A.C. 78.
(7) *Ridge* v. *Baldwin & Ors.* [1964] A.C. 40.

ORIGINATING MOTION.

S. Sivasubramanian for the applicants.

Mokhtar bin Sidin (Senior Federal Counsel) for the first respondent.

Syed Othman J.: The first applicant is the president of the National Union of Plantation Workers (NUPW) of Sungei Talam Division. The second applicant is his wife. Both were rubber tappers under the employ of the second respondents (the employers) until 6th September, 1971 when they were dismissed.

They seek an order of certiorari to remove into this court and quash a decision dated 7th December, 1971 made by the first respondent (the Minister) under section 16A of the Industrial Relations Act, 1967 confirming the dismissal of the applicants by the employers.

The grounds on which the order is sought are in effect that the Minister acted in error of law and exceeded his jurisdiction in refusing to interfere with the decision of the employers, as there was insufficient evidence to support or justify the dismissal.

Paragraphs 3 to 9 of the applicants' affidavit, which are said to show the circumstances leading to the dismissal, read: —

"(3) Sometime in late August, 1971 the second respondent informed all the rubber tappers at Sg. Talam Division that they had to go out in the afternoon again, after normal duty hours, to scrape the rubber trees and clean the latex cups without receiving any additional payment therefor.

(4) As President of the National Union of Plantation Workers Sg. Talam Division, I, (the first applicant) instructed the other rubber tappers not to do the work as the subject matter was being negotiated between the National Union of Plantation Workers and the Malayan Agricultural Producers Association, the second respondents' Union.

(5) On or about 2nd September, 1971, the estate conductor, a servant of the second respondent, informed that if I (the first applicant) was not prepared to do the scraping the second respondent would not mind but requested me not to ask the other rubber tappers not to co-operate. I did not agree to this suggestion.

(6) On or about 4th September, 1971 at about 1.00 p.m. the said estate conductor informed all the rubber tappers that they should go out again at 2.00 p.m. to scrape the rubber trees and clean the latex cups without receiving any additional payment therefor.

(7) The said estate conductor produced a letter purportedly from the National Union of Plantation Workers.

(8) I (the first applicant) examined this letter and found that it was not from the National Union of Plantation Workers. I asked the other rubber tappers not to carry out these additional duties till the National Union of Plantation Workers and Malayan Agricultural Producers Association had reached an agreement on the same.

(9) On 6th September, 1971, I (the first applicant) was dismissed by the second respondent allegedly for 'misconduct' and I (the second applicant) under section 17 Employment Ordinance, 1955".

The employment of the second applicant was terminated by operation of section 17 of the Employment Ordinance, 1955 (No. 38 of 1955), which provides: — "Where a contract of service between an employer and a labourer terminates, any contract of service between the employer and the husband or wife of the labourer shall also terminate unless the husband or wife within forty-eight hours of the termination of the labourer's contract of service notifies the employer that he or she desires that such contract of service shall continue in force."

The affidavit further deposes that on 13th November, 1971 an enquiry was held under section 16A of the Industrial Relations Act, 1967 (No. 35/1967) and the Minister "confirmed the dismissal" on 7th December, 1971. On 14th April, 1972 the applicants applied for a copy of the notes of enquiry. But the Ketua Penggarah Hal Ehwal Perhubongan Perusahaan, Malaysia refused the application on the ground that the decision of the Minister under section 16A of the Act is final and conclusive and cannot be challenged in any court.

The employers have chosen to ignore the process of this court. They have not extended to this court the courtesy of appointing a representative at the hearing of the application, if not for anything, at least for the purpose of assisting the court in clarifying any point of law which may arise in this case.

The Minister is represented at the hearing. The Assistant Director of Industrial Relations who held the enquiry has since died. His successor in office has filed an affidavit in reply to the applicants' affidavit and is to the following effect. The applicants on 28th September, 1971 appealed to the Minister against the dismissal. The enquiry was held, as stated by the applicants, on 13th November, 1971. Present at the enquiry were the first applicant, a representative of the NUPW, the acting Manager Kuala Reman Estate representing the employers, representative of the Malayan Agricultural Producers Association assisting the employers and the parties' witnesses. The employers in presenting their case stated that prior to the date of the first applicant's dismissal a notice was given to the workers to the effect that it was the duty of the workers to clean the rubber trees below the tapping point; the

first applicant not only refused to do the work but instigated the others not to do it; the union had never brought up the question of claiming extra pay for the work; the employers then held an enquiry at which the first applicant stated that he would not carry out the instructions; the first applicant was then dismissed. The employers also stated that in six other estates the work was a normal line of duty for which the workers did not get extra pay; that had been the practice in the estate in the past; and in the last few years the extent of cleaning had been reduced from one foot below panel to between 6-9 inches only.

The union and the first applicant did not question the employers because they said the person appearing was not the manager of the estate at the relevant time.

The first applicant in his case at the enquiry stated that he was aware of the notice and understood it; he had refused to do the work because he was not paid; he had told the other tappers to do the same; in another estate where he had worked he had not been required to do the work; he and the other workers had done the work in the estate of the employers from 1967 to 1971 without extra pay; he admitted that he had never brought up the question of extra pay to the employers for the work although he had met the manager on a number of occasions; he agreed that the matter could have been discussed with the manager.

The acting Assistant Director further states in the affidavit that the allegation and assertions made in paragraphs 5 to 8 of the applicants' affidavit were not raised at the enquiry. I find there is no evidence to support that these events occurred. There is no affidavit by the conductor mentioned or by an independent witness. I would disregard these paragraphs from consideration.

Under section 16A of the Act on representation by the workman against dismissal, the Minister after taking the steps prescribed therein may direct the employer, either to re-instate the workman or to pay him compensation. See sub-section (4). In the ordinary course of events when power is given to a person to do a thing, he may refuse to exercise it.

The immediate question to be considered now is whether the court can interfere with the decision on the grounds stated in the application, having regard to section 16A(5) of the Act, which reads: —

"The decision of the Minister on any representation made under this section shall be final and conclusive and shall not be challenged in any court or in a court established under this Act."

On behalf of the applicants, it is argued that the words appearing in the sub-section are not enough to take away certiorari from the court. Reference is made to *Halsbury's Laws of England* (Vol. 11 pages 137-39). On behalf of the Minister it is argued in effect that on the plain words enacted by Parliament, the court has no jurisdiction to issue certiorari. Reliance for this argument is placed on *Catt* v. *Wood*;[1] *Smith* v. *East Elloe Rural District Council*[2] and *Mohamed Ashraf & Another* v. *Commissioner of the Federal Capital, Kuala Lumpur*.[3] I find it necessary to discuss these cases before proceeding further in this matter.

In *Catt's* case, section 68 of the Friendly Societies Act, 1896, provides: —

"Every dispute between a member ... and the society, ... shall be decided in manner directed by the rules of the society or branch, and the decision so given shall be binding and conclusive on all parties without appeal, and shall not be removable into any court of law or restrainable by injunction."

In the course of delivering his judgment Loreburn, L.C. said at page 407: —

"It seems to me we have the most express enactment forbidding courts of law from interfering in a matter of that kind. I think it is most necessary that we should obey loyally the enactments which were made in order to prevent multitudinous litigation and to give effect to decisions (if they be honest and not open to a charge of misconduct) of those who are deciding rightly or wrongly within the jurisdiction which is confided to them by the laws of this country."

In *Smith's* case, the appellant sought a declaration that a compulsory purchase order made by the local authority and confirmed by the Minister of Health was wrongful and in bad faith. Paragraph 16 of Schedule I to the Acquisition of Land (Authorization Procedure) Act, 1946 provides to the effect that a compulsory order shall not be questioned in any legal proceedings whatsoever. Viscount Simonds at page 751 said: —

"It was urged by counsel for the appellant that there is a deep-rooted principle that the legislature cannot be assumed to oust the jurisdiction of the court, particularly where fraud is alleged, except by clear words, and a number of cases were cited in which the court has asserted its jurisdiction to examine into an alleged abuse of statutory power and, if necessary, correct it."

He went on: —

"... My Lords, I do not refer in detail to these authorities only because it appears to me that they do not override the first of all principles of construction, the plain words must be given their plain meaning. There is nothing ambiguous about paragraph 16; there is no alternative construction that can be given to it; there is in fact no justification for the introduction of limiting words such as 'if made in good faith', and there is the less reason for doing so when these words would have the effect of depriving the express words 'in any legal proceedings whatsoever' of their full meaning and content."

Counsel for the Minister relies heavily on this passage as ousting the court's jurisdiction.

Pausing here, in contrast to this strict construction by Viscount Simonds it will be observed that in *Catt's* case Lord Loreburn L.C. made the qualification that the courts would give effect to decisions, if they be honest and not open to a charge of misconduct.

The House of Lords in *Anisminic Ltd.* v. *Foreign Compensation Commissioner & Anor.*[4] unanimously expressed doubts in the decision of *Smith's* case. I do not think it is necessary for me to set down the observations of Lord Reid on the ouster clause. He was one of the two law Lords who did not agree with what Viscount Simonds said in *Smith's* case. In *Anisminic's* case although Lord Morris of Borth-y-Gest and Lord Pearson gave dissenting judgments, they clearly expressed that they were not in favour of what Viscount Simonds said on the ouster clause in *Smith's* case.

Lord Morris of Borth-y-Gest at page 181 said: —

"If a case arose where bad faith was alleged the difficult case of *Smith* v. *East Elloe Rural District Council* .... would need consideration, but the present case, in my view, can be approached without any examination of or reliance upon that case."

Lord Pearson said at page 215: —

"...I have had the advantage of reading in advance the opinion of my noble and learned friends, Lord Reid, Lord Pearce and Lord Wilberforce .... I agree with them also that what has been called the 'ouster provision' in section 3(4) of the Foreign Compensation Act, 1950, does not exclude the court's intervention in a case where it is merely a purported determination given in excess of jurisdiction."

From the authorities discussed in *Anisminic's* case, the House of Lords in *Smith's* case appeared not to have considered *Bradlaugh's* case.[5] In this case there was an ouster clause, but Cockburn C.J. said at page 513: —

"I am clearly of the opinion that the section does not apply when the application for the *certiorari* is on the ground that the inferior tribunal has exceeded the limits of its jurisdiction."

Mellor J. said: —

"It is well established that the provision taking away the *certiorari* does not apply when there was an absence of jurisdiction. The consequence of holding otherwise would be that a metropolitan magistrate could make any order he pleased without question."

In *Andrew & Others* v. *Mitchell*[6] and *Ridge* v. *Baldwin and others*[7] excess of jurisdiction was shown and the courts interfered with the decision arrived at despite the ouster clause.

By these authorities the clear indication is that the construction that Viscount Simonds gave in *Smith's* case has gained no support from the other Law Lords.

As regards *Mohamed Ashraff's* case, *supra*, counsel for the Minister has referred to what was said by Ong C.J. at page 70: —

"Parliament has further declared by sub-section (12) that the commissioner's decision under section 18A shall be final and conclusive and shall not be questioned in any court. By this provision is it the intention of Parliament that decisions of commissioner shall be free of surveillance and control by the courts? I have given this point the most anxious consideration, and not without some misgivings have come to the conclusion that the answer be in the affirmative for this reason. Rent control has for several decades seriously encroached upon the common law rights of landlords. In the public interest Parliament thought fit to put shackles upon the rights of the landlord of controlled premises to deal with his property as he deems fit. Decontrol is nothing more than a measure to restore those rights to their pristine fullness. Section 18A is clearly one of those measures."

To my mind this passage should not be read by itself, as later the learned Chief Justice expressed his misgivings when he said: —

"...When conditions imposed by paragraphs (b) and (c) are such that the evidence of future financial capability on the part of the landlord to carry out the proposed development may leave the commissioner in doubt regarding its feasibility. Then of course, it would be right and proper for him to make no order. Where, however, the evidence offered is satisfactory, I think it would be an abuse of his powers to reject any application, since proof of compliance with paragraphs (b) and (c) leaves him with no discretion at all unless he deliberately ignores the law. Such proof is purely a question of fact."

This passage, as I understand it, clearly suggests that the court would not interfere if the decision was right and proper but would interfere if it could be established that the commissioner in arriving at his decision deliberately ignored the law.

From all these authorities, I am inclined to think that the better view of the law is that a plea that the court cannot interfere with a decision by reason of an ouster clause will only be accepted if the decision was reached according to the law. If the decision is not according to law, the court would invariably interfere with it. To my mind, a decision not according to law is no decision at all. In the present case, I would say that the decision of the Minister can be questioned if it can be shown that it was reached as a result of no proper enquiry, or of failure to comply with the prescribed procedure for an enquiry, or if it can be shown that the decision was a nullity for lack of jurisdiction or for failure to comply with the law.

I shall now consider whether any ground for certiorari has been shown in this application.

It is alleged that the dismissal was because the first applicant had participated in activities of a trade union, and it was therefore contrary to section 5(1)(d)(ii) of the Industrial Relations Act, 1967. The relevant portion of this section reads: —

"5(1) No employer or trade union of employer, and no person acting on behalf of an employer or such trade union shall —

(a) dismiss or threaten to dismiss a workman .... by reason that the workman

(ii) participates in the promotion, formation or activities of a trade union".

"Participation in the activities of a trade union", in this provision, I would say, generally means taking part in the life of a trade union *e.g.* by being a member or by holding an office in a trade union. I do not think it would cover the activity of a worker in the matter of work to be done and directed by his employer, conditions of employment or matters affecting discipline.

In the present case, the first applicant was not dismissed simply because he was president of NUPW of Sungei Talam Division. He says he was dismissed because he merely refused to do extra work without extra pay and he told the other workers to do the same. He claims that he had the right because he was the president of NUPW and the matter was being negotiated. But at the enquiry before the Labour Officer no evidence was adduced that the union had entered into negotiation with the employers, or that the union had even passed a resolution authorising the negotiation; as a matter of fact the first applicant himself admitted that he had never brought up to the employers the question of extra pay for the work.

I have been referred to a letter by NUPW, Pahang State Branch to the Secretary, NUPW Jeram Kuantan Estate, filed with the supplementary affidavit of the first applicant. I must confess I do not know what exactly is the relationship between NUPW, Jeram Kuantan Estate, and NUPW, Sungei Talam Division, of which the first applicant is the president. I can only suppose that the workers of the two estates had the same problem and that when the NUPW, Pahang State Branch, wrote a letter to one estate the other should take cognisance of it.

In any case, on the strength of paragraph 7 of this letter which was dated 14th September, 1971 the first applicant says that as late as that date, but after his dismissal, no agreement had been reached on the cleaning of the rubber trees. The letter, from what I can see, is intended to set out the procedure to

be followed and the matters to be raised if negotiation was to be entered into. Paragraph 7 reads — "Different name should be given for tree scrapping. Try to negotiate with the management for the success." As submitted on behalf of the Minister, this letter clearly advised the first applicant to enter into negotiation. I cannot see how any agreement could be reached when the first applicant did not even enter into negotiation with the employers.

On the evidence I find that when the employers issued the instructions that the workers should carry out the cleaning work, the first applicant took it upon himself that the employers had no right to issue those instructions.

As a matter of law, whether or not there was any negotiation, I cannot find anything which gives a president of a trade union, or any other office holder, for that matter, the right to issue instructions to the workers which in effect would amount to countermanding the lawful direction of the employers in the matter of work to be performed by the workers. If an office-bearer of a trade union had this right, the position of the employers would be untenable and I doubt very much if they could maintain discipline. On the facts that have been adduced, I find that the first applicant was in breach of discipline when he refused to obey the lawful direction of the employers. He was in more serious breach of discipline when he "instructed" workers not to do the work. I would also say that as president of the union he should have shown a greater sense of responsibility and restraint by entering into negotiation with the employers. For what he had done I find that his dismissal was justified and the Minister was right in refusing to interfere with the decision of the employers.

As to the second applicant, it is now said that the employers should have informed her of the provisions of section 17 of the Employment Ordinance, 1955. I have no doubt that a thoughtful employer would go out of his way to inform the spouse of these provisions, but I cannot see anything in law which requires him to do so. These provisions have been in the law for many years now and should be within the knowledge of an employed spouse.

The application is dismissed with costs to the first respondent.

Application dismissed.

Solicitors: *S. Sivasubramanian.*

PUBLIC PROSECUTOR v. SIA YOK HUA

[A.Cr.J. (Pawan Ahmad J.) December 4, 1973]
[Malacca — Criminal Appeal Nos. 1 & 2 of 1973]

Road Traffic — Driving without valid driving licence — Expired provisional driving licence — Insurance policy in force — Whether driver guilty of using motor vehicle without third-party insurance — Road Traffic Ordinance, 1958, ss. 74 and 79.

In this case the accused had been convicted of driving a motor cycle without a valid driving licence. He had an expired provisional driving licence but he had a third-party insurance policy which was in force. He was charged with using the motor cycle without third-party insurance but was acquitted as the learned magistrate held that he was covered by the policy of insurance which was in force. The Public Prosecutor appealed.

Held: section 79(j) of the Road Traffic Ordinance, 1958, makes it clear that although the accused had no valid driving licence, the insurance company were precluded from repudiating liability in respect of third-party risks and therefore the accused was at the material time duly covered by the policy of insurance. The appeal must therefore be dismissed.

[Editorial Note: Reference might be made to the cases of *Velusamy* v. *Public Prosecutor* [1974] 1 M.L.J. 15 and *Public Prosecutor* v. *Ung Ah Leng* [1974] 1 M.L.J. 84 where the learned judges held that section 79 of the Road Traffic Ordinance, 1958, did not affect the criminal liability of a person driving a motor vehicle.]

Cases referred to:-

(1) *Jones* v. *Welsh Insurance Corporation Ltd.* [1937] 4 All E.R. 149.
(2) *John* v. *Humphreys* [1955] 1 W.L.R. 325.
(3) *Devey* v. *Towle* [1973] Crim. L.R. 360.
(4) *T.S.B. Maniam* v. *Public Prosecutor* [1946] M.L.J. 39.

CRIMINAL APPEAL.

Abdul Murad bin S. Ismail (Deputy Public Prosecutor) for the appellant.

A. C. Vohrah for the respondent.

Pawan Ahmad J.: In Magistrate's Court Case No. 10B of 1972 the accused was tried on the following charges:

(1) Section 34A(1) of the Road Traffic Ordinance, 1958.

(2) Section 25(2) and 146(1)(d) of the Road Traffic Ordinance.

(3) Section 74(1) and 74(2) of the Road Traffic Ordinance.

At the close of the prosecution case the court amended the first charge to one under section 36(1) of the Road Traffic Ordinance. The accused pleaded guilty to the second charge and on the third charge the court found him not guilty. He was thus called to enter upon his defence in respect of the amended first charge only. At the end of the case he was found guilty on the amended first charge and was convicted and sentenced to a fine of $500 in default 3 months' imprisonment. In addition, his driving licence was endorsed. As to the second charge the accused was fined $100 i.d. 2 weeks' imprisonment.

Criminal Appeal No. 1 of 1973 is brought about by the Public Prosecutor from the order of acquittal on the third charge, whilst Criminal Appeal No. 2 of 1973 is by the accused from conviction and sentence on the amended first charge. I dismissed the appeal on the first charge against conviction. I allowed the appeal as to sentence and reduced the fine to $250. In his evidence before the Magistrate's Court, the accused stated that just before the accident, he was travelling at a speed of 20 miles per hour. He saw a child crossing from the right side of the road and that when he first saw the child he was about 30 feet away. I have scrutinized the record very carefully and I am unable to find any evidence of speed. Under such circumstances I consider a fine of $500 to be excessive especially when the accused has a clean driving licence.

Now coming to the appeal of the Public Prosecutor in regard to the third charge the policy of insurance Exhibit P5 under the heading "Authorised Driver" in the schedule reads as follows: —